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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-864

BIAGIO J. PERRELLO, PETITIONER
v.
THE INDIANA SUPREME COURT DISCIPLINARY COMMISSION

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

PETITIONER'S BRIEF IN REPLY

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PETITIONER's BRIEF IN REPLY

In its Brief in Opposition, the respondent appears to raise three issues: (1) That petitioner's claim is not justiciable because he stipulated to certain factual allegations; (2) That petitioner's claim is without merit because the sole requirements of due process are notice that a hearing will be held and an opportunity for petitioner to be heard at that hearing; and (3) That

the procedures under which petitioner was suspended from the practice of law are analagous to the procedures set forth in this Court's Rule 8, and are not therefore unconstitutional. These arguments are refuted below.

Petitioner did admit to some of the factual allegations in the complaint against him. He also specifically alleged that the Indiana Supreme Court could not constitutionally shift the burden of proof to him, and that it could not, as a matter of constitutional law, prohibit the conduct alleged in the complaint. On the basis of a partially stipulated record and petitioner's legal defenses, the Supreme Court of Indiana suspended him from the practice of law because he "failed in his burden of proof of establishing why he should not be suspended..." In re Perrello, ___ Ind. ___, 380 N.E.2d 72 (1978). The Court thus stated unequivocally that its decision was based upon petitioner's failure to sustain his burden of proof. It is this legal basis for his suspension that petitioner is challenging in his petition for certiorari; he is not seeking

a review of the factual determinations made by the Hearing Officer or by the Supreme Court of Indiana. Petitioner has sustained a serious injury in fact because of his suspension and contends that the procedures under which that suspension was imposed are constitutionally defective. Petitioner's injury is a continuing one because the suspension remains in effect. His only relief is for this Court to grant his petition for certiorari and then reverse the Supreme Court of Indiana. The controversy is now, and always has been, a live one.

Respondent implies that merely by advising petitioner of the charges against him, and by giving him "an opportunity to be heard", due process is satisfied. This argument completely misconstrues this Court's decisions on the scope and application of the due process clause. Notice and hearing are essential but not sufficient. Due process is a flexible concept that is given substance in accord with the particular situation in which it is required. As this Court held in Goldberg v. Kelly, 397 U.S. 254, 263, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970):

> "The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication."

The allocation of the burden of proof is one element of due process. By applying the balancing test set forth in Goldberg v. Kelly, supra, it is apparent that petitioner has a much greater interest in avoiding the suspension that the respondent has in a summary adjudication. Generally, the burden of proof cannot be shifted by the government to a responding party, Petition for Certiorari, p. 6 et seq. Petitioner has suffered a substantial injury because he was required to sustain the burden of proof in the trial below and failed to do so. Respondent has offered no

justification for requiring petitioner to prove that he should not be suspended. In failing to do so, respondent tacitly admits that no such justification exists.

The remainder of respondent's arguments that the rules and procedures challenged by the petitioner satisfy due process requirements have been refuted in the petition for certiorari.

Respondent suggests that when a rule to show cause is issued under Supreme Court Rule 8, the burden of proof is shifted to the responding attorney in the same manner that the burden of proof was allocated to the petitioner in the trial below. This is wholly inaccurate. Rule 8 first requires proof of the ground for disbarment. The burden of going forward with the evidence is then placed on the attorney. To avoid disbarment, he must refute the charges or show why, in spite of his misconduct, he should not be disbarred. This follows the rule for civil trials. In the trial below, however, the respondent did nothing more than charge the petitioner with misconduct. Petitioner was then required to do far more than go forward with the evidence. While

it is not exactly clear what he was required to prove in order to avoid being suspended, it is clear that he had the burden of proving that he should not be suspended.

CONCLUSIONS

In summary, respondent has not made one valid argument for denying the petition for a writ of certiorari. For the reasons set forth in the original petition, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Indiana in this cause.

Respectfully submitted,

William E. Marsh, Esq.

Ralph Ogden, Esq.

M. Anne Wilcox, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 2ND day of JANUARY, 1979, three copi copies of Petitioner's Brief in Reply were hand delivered to Mr. Sheldon A. Breskow, Attorney for the Respondent, at 814 I.S.T.A. Building, 150 West Market Street, Indianapolis, Indiana 46204. I further certify that all parties required to be served have been served.

William E. Marsh, Esq.